

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 183812

Jackson Circuit Court

DANIEL MULLINS,

LC No. 94-69847-FH

Defendant-Appellant.

Before: Taylor, P.J., and Hood and Gribbs, JJ.

TAYLOR, P.J. (concurring in part and dissenting in part).

I concur with the majority opinion except as it relates to the polygraph issue. Defendant was denied his statutory right to a polygraph examination and therefore he is entitled to a remand to take such a test. We simply have no authority to preclude him from the test.

MCL 776.21(5); MSA 28.1274(2)(5) provides that a defendant who has allegedly committed first-degree criminal sexual conduct shall be given a polygraph examination or lie detector test if the defendant requests it. Defendant requested a polygraph examination on October 31, 1994, three weeks before trial was scheduled to commence. At a hearing, it was asserted that the earliest available date at which a polygraph examiner would be available was January 5, 1995. The court refused to adjourn trial or to order the examiner to make time to give defendant an exam before trial commenced.

In *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985), this Court held that a defendant has an absolute right to receive a polygraph test once a request is made, but also noted that the statute was silent about the time when the exam must be administered. In *People v Sterling*, 154 Mich App 223, 234; 397 NW2d 182 (1986), this Court stated that the test must be granted where the defendant has allegedly committed criminal sexual conduct. While defendant herein may have been somewhat dilatory in requesting the exam, the trial court clearly erred in refusing to take whatever actions were necessary, i.e., ordering the examiner to take defendant out of order or granting an adjournment to make sure that defendant received his legislatively-granted right to a polygraph test before trial.

The majority opinion states that defendant is not entitled to a remand to take the exam because: (1) the statute does not require it; (2) defendant is no longer “alleged” to have committed the crime, i.e., he has been convicted; (3) the results of the exam would have been inadmissible at trial even if he had passed the exam; and (4) it would not have been an abuse of prosecutorial discretion to charge defendant even if he had passed the exam. This reasoning is unpersuasive.

First, the statutory language requires that it be given. The language of the statute, as well as the cited case law, is clear that a defendant shall be given an exam if it is requested. Defendant made the necessary request and, therefore, he was and is entitled to an exam. Second, the fact that defendant is no longer an “alleged” criminal is not grounds to deny an exam. It is, in fact, irrelevant. The legislature, for its own reasons that we may find debatable, has said that defendants of this type have this right. Moreover, it is also the case that when the request was made (three weeks prior to trial) he was indeed only an “alleged” criminal. Under the majority’s reasoning, a trial court could deny a defendant his statutorily-granted right to an exam without consequence if the defendant is eventually convicted. This cannot be the law if the statute is to mean what the legislature clearly wanted it to mean.

The majority is correct that the results would not have been admissible at trial. That is true, but so what. This reasoning is, at heart, an attack on the reasonability of the statute. We are not called upon for such evaluations unless the legislature violates the Constitution. There is no such allegation here. In any event, other uses for the results of the exam existed before trial. MCL 776.21(3); MSA 28.1274(2)(3) provides that a law enforcement officer shall inform the victim when a person accused of first-degree criminal sexual conduct has voluntarily submitted to a polygraph examination or lie detector test and the test indicates the person may not have committed the crime. If defendant had passed the exam, the police would have been required to share this fact with the victim (presumably so she could reconsider her allegations). The trial court denied defendant the chance to take the exam and, if he passed, to have the results shared with the victim. Moreover, if defendant had passed the exam before trial, he may have been able to use the results to convince character witnesses to testify on his behalf who would otherwise have been reluctant to testify.¹ I agree that it would not have been an abuse of prosecutorial discretion to charge defendant even if he had passed the exam; however, if defendant had passed the exam the victim may have reconsidered her allegations and the prosecutor may have declined to prosecute or may have offered a plea bargain. We do not know if these things would have happened because the trial court denied defendant his right to a polygraph exam. Finally, the results of a polygraph exam are admissible in a motion for a new trial. *People v Barbara*, 400 Mich 352, 359; 255 NW2d 171 (1977). In fact, the trial court denied a motion for a new trial, on other grounds, on February 2, 1995.

For the foregoing reasons, I would remand to allow defendant to take a polygraph exam and to move for a new trial, or other available relief, if the test indicates that he may not have committed the crime.

/s/ Clifford W. Taylor

¹ I note that the jury initially told the court it was deadlocked and eventually acquitted defendant of three of the four charges in this case.